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December 3, 2002

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: Notice of Proposed Rulemaking
CG Docket No. 02-278
Telephone Consumer Protection Act

Dear Ms. Dortch:

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment on the Notice of Proposed Rulemaking set forth at CG Docket No. 02-278 (the "Notice"). Bank of America is one of the world's leading financial services companies, and is the sole shareholder of Bank of America, N.A., one of the largest banks in the United States. Through the nation's largest financial services network, Bank of America provides financial products and services to 30 million households and two million businesses, as well as providing international corporate financial services for clients around the world.

The Federal Communications Commission ("FCC") seeks comment on whether its rules implementing the Telephone Consumer Protection Act ("TCPA") should be revised to ensure that they continue to effectively carry out the purposes of the TCPA. In particular, the FCC has asked for comment on whether its rules should be revised relative to the effectiveness of company-specific do-not-call lists and whether it should revisit its 1992 decision not to establish a national do-not-call list.

Bank of America endorses the idea of a national "do-not-call" list, *provided* that a prescribed regulatory list establishes a uniform national standard and *provided* that any such list does not impede the ability of companies to communicate with customers with whom the companies have existing, ongoing business relationships. The following detailed comments initially identify some issues presented by the Notice that have significant impact on these and other key concerns.

National Do-Not-Call List

Bank of America supports the concept of a national "do-not-call" list that would allow all consumers to register their requests not to be telemarketed. We believe consumers should have convenient methods for expressing their direct marketing preferences. That is why Bank of America established its own do-not-call list, which has been in place for many years. Bank of America also purchases and uses the various state do-not-call lists, even though banks are exempt from those requirements in some states. As Bank of America Chairman Ken Lewis recently stated, "Why would we want to call people at home who are clearly hostile to the idea of being called at home?" We also respect consumers' marketing preferences by voluntarily offering customers and non-customers the option not to receive marketing information through separate direct mail or e-mail. In addition, Bank of America uses the Direct Marketing Association's direct marketing preference services to honor telemarketing, direct mail and e-mail marketing preferences of consumers who have expressed their choices on those national databases. Our Privacy Policy for Consumers, which we furnish to every consumer customer annually and upon establishment of a relationship with Bank of America as required by the Gramm-Leach-Bliley Act, and which we post at our website, tells our customers how they can elect not to receive telemarketing calls from us, as well as how to contact the Direct Marketing Association to take advantage of the DMA's national direct marketing preference lists. This history demonstrates Bank of America's deep respect for consumers' wishes not to have their privacy invaded by various forms of direct marketing.

A single national do-not-call list would serve the purpose of providing a convenient way for consumers to elect not to receive telemarketing calls, while providing a single system and set of rules for telemarketers to use in conducting their marketing activities. It is becoming increasingly difficult to reconcile and comply with the growing number of state "do-not-call" laws and to navigate the myriad state rules governing applicability, exceptions, information provided, formatting and timing. When conducting nationwide marketing activities, even the most conscientious marketer finds it difficult to ensure that telemarketing lists meet all of the various state rules and have been timely scrubbed against the most current applicable state lists. *Any national do-not-call list must establish a nation-wide regime for this purpose and must take precedence over state rules that have the same intent.* Simply establishing one or more national do-not-call lists on top of the many state lists will only increase the complexity of conducting legitimate marketing activities and will confuse consumers as to where they need to go to opt out.

Under the TCPA, the FCC has the clear authority to establish a national do-not-call list and to take precedence over state do-not-call list laws, at least as to interstate calls. Congress made it clear in the TCPA that the FCC has authority over interstate calling. In addition, the FCC has

this authority over most types of business entities. We raised this issue in our comment to the Federal Trade Commission ("FTC") relative to the FTC's proposal to establish a national do-not-call list. The FTC's jurisdiction is limited and a national list established by the FTC would not be able to provide the uniform national standard that telemarketers need to ensure compliance and that consumers need to understand how they can ensure that their request not to be called for marketing purposes will be honored. We urge the FCC to work with the FTC to ensure that only one national do-not-call list, which establishes a national standard, is promulgated. Because the FTC has already issued its proposal for a national do-not-call list, Bank of America urges the FCC to encourage the FTC to defer or forgo action on its proposal pending resolution of the issues raised by the FCC in its Notice. If a single national list that creates a national standard is not promulgated, then Bank of America supports continued use of the company-specific do-not-call lists.

While we support a single national standard for a do-not-call list, it is still possible for states, in addition to the federal government, to provide enforcement of that standard. We understand that there is concern about the ability of the FCC to provide the breadth of enforcement that is currently provided by state attorneys general. Bank of America is not opposed to a provision permitting states' attorneys general to enforce those national rules, where appropriate.

Established Business Relationships

It is imperative that businesses be able to call their existing customers to discuss those ongoing relationships. This is especially true for financial services (and other service industries) because the customer relationships constitute ongoing relationships, not single, one-time sales of goods. Financial services providers often work to develop relationships with their customers that may involve many different products (such as mortgages, credit cards, deposit accounts, and investments) that may be provided by different affiliated entities. Thus, it is common to offer customers additional or different products and services to more closely serve the customer's changing financial needs. Though we recognize that some of our customers prefer not to receive telephone calls from us and we honor those preferences, we also know that many of the same consumers who do not want to get telemarketing calls from businesses with which they have no business relationship are pleased to receive a personal call from their banker or other service provider to discuss the status of their accounts or enhancements to their services that could provide greater convenience or cost savings or better serve their changing needs. For example, last summer we called customers who, because of the existing business they did with us, qualified for service agreements that included fee waivers, rate discounts or other benefits. They didn't have to buy anything or do anything. All they had to do was say "yes" — and the 2000+ customers who did say "yes" collectively saved more than half a million dollars just for taking the call.

In addition, it is not uncommon for calls that initially constitute servicing calls to a customer to result in a sale of another product or service that would better serve the customer. For example, a call regarding a returned check or insufficient funds charge to a customer's checking account may result in the sale of overdraft protection service tied to the customer's credit card or other credit or investment account so that the customer can avoid returned checks and NSF fees in the

future. It is not practical for customer service agents to consult a national registry mid-call in order to determine whether to inform the customer about services that may improve the quality or reduce the cost of services the customer receives in the future. And it is not fair or beneficial to consumers if such hallmarks of good service must be curtailed because such activities may be deemed "telemarketing." Thus, the FCC should continue the exemption for calls made to the business' existing customers in connection with any national do-not-call list and not require that the customer affirmatively opt in to receive such calls.

An exception for existing customer relationships should also apply to the affiliates of the financial institution that has the customer relationship. Frequently, as mentioned above, financial institutions have multiple legal entities that provide various elements of the financial services offered by the overall company. Examples for Bank of America are credit cards and deposit accounts. These are frequently offered by different legal entities that are affiliates. In order to best serve the customer, one entity may want to offer the products and services of another affiliated entity, and may be able to offer discounts based on the customer's total relationship. Customers clearly benefit from such offers and it otherwise may be difficult for them to learn about those savings opportunities. Thus, the customer relationship should be extended to include the financial institution's affiliates as well.

We recognize that the TCPA applies to many types of businesses and granting this type of exception may make more sense in one context than in another. This exception can be defined in such a way as to limit the applicability to business relationships likely to be viewed as such by the consumer. Most of the states that have adopted do-not-call list laws incorporate an exception for existing business relationships. In surveying those provisions, we believe that the best one for this purpose was adopted by Arkansas, as follows:

> (5)(A) The term "prior or existing business relationship" means a relationship in which some financial transaction has transpired between the consumer and the telephone solicitor or its affiliates within the thirty-six (36) months immediately preceding the contemplated telephone solicitation. (B) The term does not include the situation wherein the consumer has merely been subject to a telephone solicitation by or at the behest of the telephone solicitor within the thirty-six (36) months immediately preceding the contemplated telephone solicitation;" Ark. Stat. Ann. 4-99-403.

Such a provision would prevent businesses from claiming this exception where there was a one-time sale of goods or inquiry more than three years prior to the call, but would include relationships where an ongoing service is provided or a series of purchases are made that are more likely to be viewed by the consumer as an established business relationship.

Specific Comments

The following comments relate to the specific requests for comment contained in the numbered paragraphs of the Notice.

14. Disabilities. Bank of America is not aware of any specific difficulties experienced by

consumers with hearing or speech disabilities in requesting to be placed on the do-not-call lists.

17. Company-Specific Lists. Bank of America does not believe that the rules should be amended to require businesses to confirm that a consumer's request to be placed on the company's do-not-call list have been implemented. Also, we oppose any rule that establishes a strict time frame within which to implement a request not to be called. All businesses operate somewhat differently and will have different procedures and processes to implement these requests. In addition, many businesses use vendors to conduct telemarketing, which may add some additional time and complexity to the process. If a maximum time is considered, it should not be less than 45 days.

20. Artificial or Prerecorded Voice Messages and Established Business Relationships. The rule permits a company to deliver an artificial or prerecorded voice message to consumers with whom they have an established business relationship. If an ongoing contractual relationship exists, it may be necessary for the business to continue to contact the customers. This is especially true in connection with calls to collect loans. It is common to leave prerecorded messages in connection with collection activity. In addition, this portion of the rule is not limited to calls that constitute "telephone solicitations" and therefore could apply to collection or service-only calls. . A customer should not be able to terminate an established business relationship for purposes of the rule simply by telling the business that they no longer wish to receive calls. Any interpretation that would allow an overdue debtor to "terminate" the relationship simply by stating that they no longer wish to receive calls would prevent a great deal of legitimate calls made to collect debts or service relationships. Thus, we strongly encourage the FCC to retain the current definition of "established business relationship" or to use something similar to that established in Arkansas, but to make it clear that it is not terminated solely by the consumer indicating that he or she no longer wishes to receive telephone calls.

26. Predictive Dialers. Bank of America does not believe that a predictive dialer constitutes an autodialer under the TCPA. A predictive dialer is a program that dials consumers' telephone numbers in a predetermined manner so as to predict when a live telemarketer will be available to talk to the consumer when he or she answers the phone. This technology maximizes the efficiency of telemarketing and is also used in other contexts, such as debt collection. These programs do not generate numbers to be called in random or sequential manner. Instead, a given set of phone numbers that the business intends to call are loaded and the programs work to predict the timing of when a live agent will be available to speak with a consumer who answers the phone.

We understand that some consumers can be annoyed by answering the phone to "dead air" when a live agent was not available. However, Bank of America believes that restricting the use of predictive dialers in telemarketing will have the effect of reducing the efficiency of this type of sales activity, costing business more and ultimately costing the consumer more for products and services. We suggest that the FCC consider some type of threshold number of dropped calls that would be permitted. We believe that the 5% threshold, currently promoted by the Direct Marketing Association ("DMA"), would serve as a good rule and could then be enforced to limit the incidence of "dead air" calls.

29. Initial Identification. We believe that this same rule should apply to the interpretation of the requirement to provide disclosures at the beginning of any telephone solicitation. Thus, so long as the telemarketer does not exceed the 5% dropped call threshold, it would not be considered to be in violation of the requirement to provide initial disclosures.

34. Established Business Relationship. As mentioned above in our general comments, Bank of America believes strongly that an established business relationship exception should continue in the rule and does not believe that the definition of established business relationship needs to be revised. However, if there is concern that limited contact should not serve as the basis for an ongoing relationship, we suggest that the definition be something similar to that implemented in Arkansas. In addition, any contractual relationship (such as an open deposit or loan account) should not be able to be "terminated" for purposes of this rule simply by telling the company that the consumer no longer wishes to receive telephone calls. A contrary interpretation would infringe on existing contractual relationships and would be inconsistent with the literal meaning of the term "established business relationship."

35. Termination of Established Business Relationship. We do not believe that when a customer asks not to be called, that constitutes a termination of a relationship for purposes of this rule. While Bank of America does honor such requests, and most companies have an incentive to do so to keep current customers satisfied with their service, we also believe that we need the flexibility to ensure that customers receive the best possible service and best possible product fit. Sometimes this may require that we contact those customers. Thus, we need the flexibility to be able to call existing customers to make sure that we are giving them the most value. Customers will only continue to do business with an organization if they are satisfied with the service and products they receive.

36. Calling Hours. Bank of America believes that the current time of day restrictions limiting calls to between 8:00 am and 9:00 pm, local time to the call recipient, remain satisfactory.

43. Wireless Phones. It is currently very difficult or impossible, in some areas, to distinguish between wireless and wired telephone numbers. If a consumer provides his or her wireless number as the number at which he or she wants to be contacted, marketers will use that number. Therefore, any provision that restricts such calls beyond other general restrictions should be eliminated.

47. Private Right of Action. We believe that the current rule allowing consumers to file suit if they have been called more than once during 12 months in violation of the rules governing telemarketing should continue. A standard allowing suit after only one call is overly stringent and will only lead to excessive litigation in already overloaded state court systems. In addition, the current standard still operates as a deterrent to, or to compensate consumers for, unwanted intrusions, while balancing the legitimate interests of marketing companies and the actual harm caused by additional telephone calls.

48. State Law. The TCPA permits the states to adopt more restrictive requirements only on an *intrastate* basis. This clearly demonstrates Congressional intent to occupy the field with respect to *interstate* calls. Thus, federal law would supercede any application of a state list law to

interstate calls. We urge the FCC to clarify that the TCPA and FCC rules take precedence over state do-not-call statutes with respect to interstate calls, even if there is no conflict with the specific state law.

49. National Do-Not-Call List. As stated above, Bank of America believes that the FCC should revisit its determination not to adopt a national list, but only if it can preempt state do-not-call lists and continues to provide an exemption for calls made to consumers with whom the caller has an established business relationship. We understand that consumers continue to complain about receiving unwanted telemarketing calls and Bank of America has offered its own opt out system for such requests, as discussed above. However, we believe that one national list with one standard will better serve this purpose than many state lists with differing rules, formats, exemptions and timing. As the FCC noted in its Notice, this would provide consumers with a one-step method for preventing telemarketing calls. In addition, marketers will be better able to ensure compliance. As mentioned above, the FCC should work with the FTC to ensure that only one national list is adopted and that it is adopted under the TCPA that will have broader coverage and clear Congressional mandate.

50. Constitutionality. As discussed in the FCC's Notice, the standards set forth in Central Hudson Gas & Elec. Corp. v. Public Service Commission, 447 U.S. 557 (1980) must be followed to ensure that any restriction on commercial speech is narrowly tailored to serve the substantial governmental interest of ensuring consumers' freedom from invasions of privacy from unwanted telephone solicitations. This will require a clear statement of that substantial government interest as well as tailoring the rules to ensure that they do not overly restrict calls that consumers wish to receive. We believe that including the established business relationship exception, as well as the exception for calls that the consumer gave prior express permission to receive will go a long way toward limiting the overbreadth that may be inherent in a national list as opposed to a company-by-company list, while still advancing the governmental interest of limiting unwanted telephone solicitations.

51. Maintenance of a National List. While it is true that there would be significant list management issues in maintaining a national do-not-call list and keeping it accurate, we believe that they can be managed. Specifically, limiting the time period for the effectiveness of a request not to be called to no longer than two years would help to reduce the number of telephone numbers on the list that no longer belong to the consumer who originally requested inclusion on the list. Thus, any proposals for a national do-not-call list must address the manner in which it will be kept up-to-date and accurate and maintain only valid listings.

52. Disadvantages of a National List. We believe that the burdens on telemarketers of using a single national list are far fewer than the benefits of uniformity in rules, exemptions, timing and compliance to be gained by a national list. We believe that telemarketers could be provided with regional access by virtue of obtaining access to portions of the list identified by area codes for selected geographies. This would ease the burden for local or regional telemarketers while retaining the benefits of one set of rules and one governing list.

55. FTC Proposal. As stated above, Bank of America encourages the FCC to use its authority under the TCPA to establish a single national do-not-call list and to urge the FTC to defer

adopting its proposed list. The TCPA has set forth a clear Congressional mandate regarding the authority of the FCC under the TCPA to address the right of consumers to avoid receiving unwanted telephone solicitations through a national do-not-call list. It has also set forth the criteria which the FCC is to consider in determining whether and how to establish such a list. On the other hand, the Telephone Consumer Fraud and Abuse Prevention Act ("TCFAPA") under which the FTC is acting is much more directed to deceptive and abusive practices.

60. State Do-Not-Call Lists. While many of the states have stepped in to address the growing consumer concern about unwanted telemarketing calls, they result in many varying sets of rules that make compliance very difficult. Although Bank of America regularly uses these lists in its desire to honor consumer preferences, it believes that a single national standard would better serve consumers by providing a single source for consumers to use in limiting unwanted calls and also promote better compliance by telemarketers.

61. to 64. Coordination of National List with State Lists. Bank of America believes that one single national standard would be best to avoid confusion both for consumers (as to what rules apply to any particular call they receive) and to marketers (for the same reason). However, the TCPA may not authorize the FCC to completely preempt state list laws as to intrastate calls. We encourage the FCC to seek Congressional authority to establish a single national list and set of rules that applies to both interstate and intrastate calls. However, we do believe that it may be appropriate to allow the states to have concurrent enforcement rights as to that law.

Thank you for the opportunity to provide our views on this important issue. Please feel free to contact the undersigned at (704)386-9644 if you have any questions about this letter.

Very truly yours,

Kathryn D. Kohler

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Assistant General Counsel

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